

April 1966

Slander and Libel Distinguished

Michael D. Sasvage

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Michael D. Sasvage, *Slander and Libel Distinguished*, 43 Chi.-Kent L. Rev. 32 (1966).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol43/iss1/6>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

injurious on their face. Words referring to the plaintiff as a "Negro" and a "Chink" were not actionable without proof of special damages in another case.⁴¹

GROUP LIBEL

The problems presented when allegedly libelous statements are directed at a group of persons were highlighted in *Latimer v. Chicago Daily News*.⁴² The plaintiffs in this case were nine attorneys out of a group of twenty-three attorneys representing certain defendants indicted for conspiracy. The language of the news item published by defendant⁴³ did not identify any particular plaintiff or plaintiffs, but was only a derogatory statement written about a group. Without being able to say with certainty that the plaintiffs were meant to be in the group of attorneys libelled, the court said that a cause of action for libel did not accrue to individuals included in the group.⁴⁴

JACK F. KUHLMAN

SLANDER AND LIBEL DISTINGUISHED

Slander has been defined as "oral defamation; the speaking of false and malicious words concerning another, whereby injury results to his reputation."¹ The definition of libel has been stated to be "a method of defamation expressed by print, writing, pictures or signs."² The distinction between slander and libel has been stated to be that "Libel and slander are both methods of defamation; the former being expressed in print, writing, pictures or signs; the latter by oral expressions."³

The aforementioned distinction appears to be fundamentally simple and uncomplicated. However, the differentiation between slander and libel has often become a perplexing judicial dilemma. Before analyzing the need for such distinguishment, it would be helpful to probe into the factors upon which the distinction has developed. It should be initially stated that the respective unilateral development of the torts of libel and slander is to the greatest extent an anomalous, religious, historical, and political accident. Only through an examination of the treatment given to defamation actions

⁴¹ *Mitchell v. Tribune Co.*, 343 Ill. App. 446, 99 N.E.2d 397 (1st Dist. 1951).

⁴² 330 Ill. App. 295, 71 N.E.2d 553 (1947).

⁴³ ". . . [T]he scum of political gangsterdom in this country are represented by as craven a group of lawyers as I've seen, not excluding the nickel and dime shysters who used to hang around the racket court on So. State St. as staff attorneys for the gambling and vice syndicate." *Id.* at 297, 71 N.E.2d at 554.

⁴⁴ *Id.* at 298, 71 N.E.2d at 555. See Annot., 70 A.L.R.2d 1382 (1960) for discussion of the right of an individual member of a group to maintain an action for libel.

¹ Black, Law Dictionary 1559 (4th ed. 1951).

² *Id.* at 1060.

³ *Id.* at 1559.

by early English courts can the distinction between the non-identical twin torts of slander and libel be rationally understood.

The early tribal codes of the Anglo-Saxons and similar Teutonic groups punished one who uttered defamatory words about a fellow tribesman. No continuous history of the development of the Anglo-Saxon law of defamation was apparent, and after the decline of the tribal and manoral courts it was largely disregarded.⁴

During the medieval period, defamatory utterances were redressed by the ecclesiastical courts and no distinctions were drawn between written or oral words.⁵ At the beginning of the Sixteenth Century, the common law courts began to compete with the ecclesiastical tribunals in defamation cases and gradually usurped jurisdiction over such actions until gaining complete control with the demise of the ecclesiastical courts.⁶ However, this conflict left its mark upon the common law treatment of defamation insofar as the development of the requirement of alleging and proving special or temporal, not spiritual, damage in the common law courts.

While the common law courts were struggling with this new and somewhat confusing tort,⁷ a wholly new concept of defamation was being formed in the infamous Court of the Star Chamber. The invention of the printing press and the ensuing circulation of printed material in England became a matter of serious concern to the established rulers who realized the dangerous effect which seditious publications could have upon a dissatisfied citizenry. Therefore, the Star Chamber assumed a strict control over the press and tried all cases involving defamation of a political nature, but dealt chiefly with written defamation.⁸ Relying on the Roman Law, the Star Chamber treated libel of both public officials and private individuals as crimes, the former since it would constitute an act of sedition and the latter because it tended to cause a breach of the peace.⁹ In the Star Chamber, truth was no defense to a seditious political libel, but it constituted a defense to a personal defamation.¹⁰

When the Star Chamber was abolished in 1641,¹¹ and after the free

⁴ Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. Rev. 304 (1925).

⁵ Donnelly, *History of Defamation*, 1949 Wisc. L. Rev. 99, 106-7.

⁶ For a discussion of the effects of this jurisdictional conflict, see the Historical Background section of this symposium.

⁷ Pollack has characterized the chaotic state of the law of defamation by declaring: No branch of the law has been more fertile of litigation than this . . . nor has any been more perplexed with minute and barren distinctions. . . . Pollack, *Torts* 243 (13th ed. 1929).

⁸ Holdsworth, *op. cit. supra* note 4, at 305.

⁹ The fighting of duels was not an infrequent method of redressing a defamatory injury during this historical period.

¹⁰ Holdsworth, *op. cit. supra* note 4, at 305.

¹¹ 16 Charles 1, c. 10 (1641). For a discussion of the free speech movement and its climax in England, see Faswell-Langmead, *English Constitutional History* 739-745 (10th ed. Plunkett, 1946).

speech movement killed press censorship, the law of defamation stood in a dichotomous state. The common law courts treated all defamatory suits as tortious actions on the case, while the now defunct Star Chamber had created the crime of libel with certain basic differences in requirements of proof and procedure, for example, that truth of a defamatory writing was no defense to a seditious political libel.

The common law judges continued the precedent established by the Star Chamber and treated libel as a crime. Questions soon arose concerning a civil remedy for an injury resulting from a libelous publication. Since the common law had treated defamation as an action on the case, the damage suffered and not the injurious character of the utterance was considered the basis of liability.¹² The common law had also required allegation and proof of special or temporal damages in a defamation action to ameliorate the protests of the ecclesiastical courts. Should these same requirements, with which a great many judges had expressed disfavor, be applied to tortious libel actions if they were to be entertained by the common law courts?

The common law judges, perhaps in an attempt to stabilize the confusing law of defamation, decided to treat libel as a tort as well as a crime, but set out different requirements of proof and pleading in libel cases. Since a libel was considered so serious in nature by the state to be designated a crime, was it not also a violation of an absolute right of the plaintiff which in early common law pleading constituted a direct trespass and not a wrong to be redressed in an action on the case? Perhaps, since the requirement of proof of special or temporal damage was an accident of history and was also soon circumvented by practical and realistic judges,¹³ the common law courts chose to adopt the Star Chamber philosophy with regard to the newly created and independent tort of libel. It was finally decided that the tort of libel should not be encumbered by the requirement of the allegation and proof of special damage but instead, that a libelous publication was actionable per se. Professor Holdsworth cites three apparent factors for the adoption of the independent tort of libel, namely, that defamation was a crime; the development of the action on the case had made this action a wholly unsatisfactory remedy; there were frequent occurrences of breaches of the peace, caused by duels to uphold the honor of the person libeled.¹⁴

The earliest decision in which libel was held actionable without proof of special damage was *King v. Lake*,¹⁵ where Judge Hale held that, "although general words once without writing or publishing them would not

12 "The law went wrong from the beginning in making the damage and not the insult the cause of action." Pollack, *op. cit. supra* note 7, at 249.

13 For a discussion on the common law exceptions to the requirement of allegation and proof of special damages in a slander action see the Slander and Slander per se section of this symposium.

14 Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. Rev. 16 (1925).

15 Hardres, 470 (1670).

be actionable; yet here they being writ and published, which contains more malice, than if they had been once spoken, they were actionable."¹⁶

Thus, the die was cast and the distinction between libel and slander established, resulting in the actionability per se of the former and the necessity of proof of special damage in the latter. The combination of factors responsible for the distinction must be kept in mind, since they play an important part in the future development of the law of libel and slander.

Although the prime effect of the distinction was to make a libel actionable per se, the significance of the manner in which the defamatory words were conveyed, namely, orally or in writing, became equally important. In other words, the form of the action became dependent upon the manner of dissemination. This interrelationship, although often indefensible in principle and criticized as illogical, has perhaps become too well established by the precedent-minded common law judges to be overturned. That this dichotomy based on mere form was well established by 1812 is echoed by the remarks of Lord Mansfield, who was forced in *Thorley v. Kerry*¹⁷ to decide whether an action would lie for written words even though no special damages were alleged or proven. He stated:

I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken. . . . If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.¹⁸

THE DEVELOPMENT OF THE MODERN DISTINCTION BETWEEN SLANDER AND LIBEL AND ITS RELATED PROBLEMS

The Restatement of Torts states the modern definition and differentiation of the torts of libel and slander in the following manner:

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is a libel rather than a slander.¹⁹

¹⁶ *Id.* at 471.

¹⁷ 4 Taunt 355 (1812).

¹⁸ *Id.* at 358. Early American cases adopting the distinction between libel and slander are: *Colby v. Reynolds*, 6 Vt. 489 (1834); *Clark v. Binney*, 2 Pick 113 (Mass. 1824); *Cooper v. Greely*, 1 Denio 347 (N.Y. 1845).

¹⁹ Restatement, Torts, § 568 (1938).

The contrast between the Restatement definition and that given at the outset of this discussion²⁰ is immediately apparent. The fundamental differentiation between written and oral words, although still importantly valid, has been expanded to meet the advancement of civilization and the legal problems which it fostered. As the methods of defamation became more sophisticated and ingenious, the courts were faced with the problem of deciding into which category, libel or slander, the imputation should be placed in order to determine the proper form of action with which to redress it.

As defamation cases continued to arise, libel was extended to include signs,²¹ statues,²² pictures and photographs,²³ and silent motion pictures.²⁴

Libel was even extended to acts and conduct of the defamer, such as refusal of a bank to honor the plaintiff's valid check,²⁵ hanging the plaintiff in effigy,²⁶ or following and "shadowing" the defendant in an obvious manner for a sustained period of time.²⁷ Such conduct or action would appear to create a defamatory stimulus perceived chiefly by the visual sense. Since libel originally envisioned written material that could be read or viewed, this attitude does not seem inconsistent. However, in *Bennet v. Norban*,²⁸ the plaintiff, who had shopped in the defendant's store, was overtaken by the store manager as she walked out of the store into the street. There, she was searched by the manager, who, being unable to find any stolen articles, mumbled an inaudible comment and walked back into the store. This action was viewed by numerous passers-by but no proof was given that they heard any remarks made by the manager. The court, citing the Restatement of Torts,²⁹ held that the store manager's conduct constituted slander since it was in reality a pantomime suggesting to the assembled crowd that the plaintiff was a thief.

The Restatement suggests that the hand gestures of a deaf mute would constitute slander rather than libel since they are a substitute for spoken words.³⁰ Therefore, the auditory or visual characteristic of the defamatory

²⁰ Black, *Law Dictionary* 1559-60 (4th ed. 1951).

²¹ *Haylock v. Sparke*, 1 El. & Bl. 471, 118 Eng. Rep. 512 (1853); *Torpley v. Blabey*, 2 Bing. N.C. 437, 132 Eng. Rep. 171 (1836).

²² *Monson v. Tussauds*, 1 Q.B. 671 (1894).

²³ *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933); *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936). The problem of libel by pictorial representation is discussed in 33 Ill. L. Rev. 87 (1938).

²⁴ *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N.Y. Supp. 829 (1915).

²⁵ *Svensen v. State Bank of Duluth*, 64 Minn. 40, 65 N.W. 1086 (1896); *Cos v. National Loan and Exchange Bank*, 138 S.C. 381, 136 S.E. 637 (1927).

²⁶ *Johnson v. Commonwealth*, 14 Atl. 425 (Pa. 1888).

²⁷ *Shultz v. Frankfort Marine Acc. and P.G. Ins. Co.*, 151 Wisc. 537, 139 N.W. 386 (1913).

²⁸ 396 Pa. 94, 151 A.2d 476 (1959).

²⁹ § 568, comment (d) (1938).

³⁰ *Ibid.* ". . . [T]he use of a mere transitory gesture commonly understood as a

dissemination is not always conclusive of whether it is libel or slander.

Words initially spoken with the intent that they be reduced to writing have been held to be libelous rather than slanderous. In a New York case, *Ostrow v. Lee*,³¹ the defendant dictated a defamatory letter to his secretary who transcribed her shorthand notes and typed the letter which was later mailed to the plaintiff. The question of the method of publication to a third party was raised since the only persons to perceive the defamatory words were the plaintiff and the plaintiff's secretary, who was necessarily the requisite third party. Judge Cardozo, in one of his usual, artistic analyses, held that the defamation was libel. He reasoned that:

Very often a stenographer does not grasp the meaning of the dictated words till the dictation is over and the symbols have been read. . . . The author who directs his copyist to read, has displayed the writing to the reader as truly as if he had copied it himself. . . . Neither the evil nor the result is different when the notes read have been taken by himself.³²

Mr. Justice Cardozo expressed the rationale for this decision somewhat poetically by stating:

The schism in the laws of defamation between the older and the newer one of libel is not the product of mere accident. . . . It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal.³³

With due respect to Judge Cardozo's analysis, which reflects the traditional judicial attitude of the common law, it would seem that defamatory words spoken before thousands of people, who in turn could recommunicate them again and again, may be more injurious than a one-sentence defamatory note sent to and read by one person. The distinction between slander and libel on the basis of mere form of expression, although generally bringing about justice, can in certain circumstances (such as the situation described above) result in questionable conclusions if slavishly followed.

If one relates a defamatory statement to a newspaper reporter, even in the presence of another person, knowing that his statement will be printed, the wrong is libel, not slander.³⁴ So also, if one reads aloud a written statement knowing it to be defamatory, the wrong is libel and not slander.³⁵ Law review writers have at times taken a rather humorous view of the

substitute for spoken words, such as a nod or a sign of the fingers, is a slander rather than a libel."

³¹ 256 N.Y. 36, 175 N.E. 505 (1931).

³² *Id.* at 37, 175 N.E. at 506.

³³ *Ibid.*

³⁴ *Valentine v. Gonzales*, 190 App. Div. 490, 179 N.Y. Supp. 711 (1920).

³⁵ *Bander v. Metropolitan Life Ins. Co.*, 313 Mass. 337, 47 N.E.2d 595 (1943).

problems discussed above and queried what determination a court would reach in deciding whether words taught to a parrot or embodied in a phonograph recording were libel or slander.³⁶

The rather nebulous state of the law was further confounded with the advent of talking movies, radio, and eventually television. The courts found little trouble in holding that defamation by words spoken in a movie constituted libel.³⁷ The apparent rationale for their decisions was stated in *Youssouf v. Metro-Goldwyn Mayer Pictures*³⁸ by Judge Slessor, who explained:

There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye and is the proper subject for libel, if defamatory. I regard the speech which is synchronized with the photographic reproduction and forms one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen.³⁹

However, defamation by radio and television has not been so easily categorized as were talking movies. Since these media were thrust into the maelstrom of the law of defamation, at least two major theories regarding the distinction of libel and slander have been formulated. The old traditional theory separated the two torts on the basis of sensory perception only, designating auditory defamation slander and visual defamation libel. The perhaps more modern view was concerned more with the permanence of form of the dissemination and its potential capacity to cause harm.

In *Sorenson v. Wood*,⁴⁰ a radio announcer orally read a defamatory statement which had been written ahead of time into a script. The words were broadcast by the defendant radio station and the defamed plaintiff brought a libel action against the announcer and the station. The Supreme Court of Nebraska reversed a judgment for nominal damages against the announcer and a dismissal against the radio station and remanded the case for further proceedings in the trial court. The Nebraska Supreme Court held that the announcer's spoken words, read from the radio script, constituted libel, not slander. In explaining its conclusion, the court stated:

There can be and is little dispute that the written words charged and published constitute libel rather than slander.⁴¹

An analogy was drawn between the strict liability imposed on newspapers for libelous publications and the corresponding responsibility of radio stations when defamatory statements are broadcast. The court concluded:

³⁶ See 51 L.Q. Rev. 281, 283 (1935); Herbert, Uncommon Law 43, 48 (1936).

³⁷ Kelly v. Loew's, 76 F. Supp. 473 (D. Mass. 1948); Brown v. Paramount-Publex Corp., 240 App. Div. 520, 270 N.Y. Supp. 544 (1934).

³⁸ 50 T.L.R. 581 (1934).

³⁹ Id. at 587.

⁴⁰ 123 Neb. 348, 243 N.W. 82 (1932).

⁴¹ Id. at 351, 243 N.W. at 85.

It has often been held in newspaper publication, which is closely analogous to publication by radio, that due care and honest mistakes do not relieve a publisher from liability for libel. . . .
 "Whenever a man publishes, he publishes at his peril."⁴²

No reference or analysis was made of the question of the form of dissemination or its potential capacity to cause harm, or its degree of permanence.

Seven years later the Pennsylvania Supreme Court reached a contrary decision in *Summit Hotel v. National Broadcasting Co.*⁴³ It held that Pennsylvania had never accepted the theory of absolute liability with regard to newspaper publications and therefore refused to apply it to radio broadcasts. However, the court took notice of the fact that the defamatory remark in issue was made by a third party not under the control of the radio station and also that the remark was not read from a prepared script.

In *Hartmann v. Winchell*,⁴⁴ Walter Winchell, in a radio broadcast, uttered a defamatory statement about the plaintiff, and it was proven that he had read such a statement from a script. The court held the utterance to constitute libel and cited the ancient doctrine established in *John Lamb's Case*⁴⁵ that "if a man read a libel on another to himself and then read it out, that made him a libeller."⁴⁶ This rationale has been criticized since the hearer of the words has no way of knowing whether the words are being spoken extemporaneously or read from a script.⁴⁷ The test of the form of dissemination in such a case seems to leave much to be desired and it is suggested that if such decisions are made they should instead be justified by the potential capacity to harm and the permanence of the defamation.

The problem of defamation by television apparently faces the same confusion and uncertainty surrounding the radio cases. A progression of cases arising in New York graphically portrays the vacillating judicial attitudes concerning television defamation.

In *Remington v. Bentley*,⁴⁸ a federal District Court, applying New York law, held that an extemporaneous oral defamation made on a television broadcast was slander. The court reasoned that since *Hartmann v. Winchell*⁴⁹ had established that oral radio defamation must be read from a script in order to constitute libel, a statement made extemporaneously on television, not read from a script, would be categorized as slander. In disregarding the visual character of television, the court stated:

. . . I feel that the additional factor of pictorial representation along with the statements adds no more to the form of defamation

⁴² *Id.* at 352, 243 N.W. at 86.

⁴³ 336 Pa. 182, 8 A.2d 302 (1939).

⁴⁴ 296 N.Y. 296, 73 N.E.2d 30 (1947).

⁴⁵ 9 Co. Rep. 60 (1610).

⁴⁶ *Id.* at 62. *Accord*, *Gibler v. Houston Post Co.*, 310 S.W.2d 377 (Tex. Civ. App. 1958).

⁴⁷ *Irwin v. Ashurt*, 158 Ore. 61, 74 P.2d 1127 (1938).

⁴⁸ 88 F. Supp. 166 (S.D.N.Y. 1949).

⁴⁹ *Supra* note 44.

than would the circumstance of a great audience in a stadium or the like listening to the spoken word. I adopt this view keeping in mind and in spite of the fact that defamation in motion pictures has been treated as libel.⁵⁰

This rationale was followed in *Landau v. Columbia Broadcasting System*,⁵¹ which held a defamatory dramatic portrayal, based upon a written script and broadcast over television, to be libelous. The importance of the dependence of the defamation upon a written script was once again emphasized.

Distinction on the basis of the "script" criterion was short-lived. Three years after the *Landau* decision a new approach to television defamation emerged from the determination of *Shor v. Billingsley*.⁵² In this case the defendant "ad libbed" a defamatory remark concerning the plaintiff during a "live" television show with no apparent reference to or dependence upon a written script. The court chose to disregard the previously adopted "script" distinction and held the defamatory utterance to be libelous. Television's inherently great capacity to cause defamatory harm influenced the court sufficiently enough to cause it to alter the status of the prior decisional law. The reasoning expressed by the concurring opinion of Justice Fuld in *Hartmann v. Winchell*⁵³ was cited as an explanation of the court's position:

If considerations of principle are to control, there is no valid reason why the same consequences should not attach to publication through the medium of radio broadcasting or flow from publication through the medium of writing.

The primary reason assigned by the courts from time to time to justify the imposition of broader liability for libel than for slander has been the greater capacity for harm that a writing is presumed to have because of its wide range of dissemination consequent upon its permanence in form.⁵⁴

In 1962, the United States Court of Appeals for the 8th Circuit⁵⁵ declined to determine the following issues:

(a) . . . whether television remarks, made essentially extemporaneously and admittedly without a script, lead in the direction of libel or in the direction of slander; (b) whether the legal result is to be any different when, although extemporaneous, the program is taped or otherwise recorded before or upon the broadcast; or (c) whether a television picture, not of the plaintiff as the allegedly defamed person but only of the interviewers and the alleged defamer, can possibly qualify as libelous . . . when its defamatory character, if it is defamatory at all, is auditory and not visual.⁵⁶

⁵⁰ *Remington v. Bentley*, *supra* note 48, at 169.

⁵¹ 205 Misc. 357, 128 N.Y.S.2d 244 (Sup. Ct. 1954).

⁵² 4 Misc. 2d 847, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

⁵³ 296 N.Y. 296, 73 N.E.2d 30 (1947).

⁵⁴ *Id.* at 304, 73 N.E. at 34.

⁵⁵ *Ross v. Anderson*, 304 F.2d 188 (8th Cir. 1962).

⁵⁶ *Id.* at 195-6.

The court in a footnote cited *Remington v. Bentley*⁵⁷ and *Shor v. Billingsley*⁵⁸ and suggested a comparison of these two decisions, but ultimately decided the case on other grounds. This judicial reluctance to become embroiled in the vacillating current of decisional law dealing with the tortious character of defamation by television is not difficult to anticipate or understand.

The problem of categorizing radio and television defamation is now rapidly becoming regulated by statute.⁵⁹ However, those states which have enacted legislation have not reached the same result when characterizing radio and television defamation.⁶⁰ The Supreme Court of Washington in *Grein v. La Poma*⁶¹ has gone as far as to suggest that the distinction between libel and slander should be entirely abolished by stating:

It is apparent that the hodgepodge of the law of slander and libel is the result of historical accident for which no reason can be subscribed. It is time that the matter be righted. There ought not to be any distinction between oral slander and written defamation. It is entirely a matter of judge made law, and English judges at that.⁶²

It can be noted that at least three major theories have been formulated to determine whether a defamatory means of dissemination is either slander or libel:

- (1) *The permanence of form theory*; testing the enduring quality of the means by which the defamatory imputation is conveyed;
- (2) *The audio-visual theory*; relying upon the sensory vehicle by which the defamatory imputation is perceived;
- (3) *The potential capacity to cause harm theory*; testing the ultimate scope and magnitude of the injurious effect of the defamatory imputation.⁶³

THE STATUS OF ILLINOIS LAW

The author's research indicates that the Illinois courts have not yet been faced with the dilemma of deciding whether an unusual form of defamatory dissemination is either libel or slander. Libel has been defined in Illinois in the following manner by a criminal statute:

. . . a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one

⁵⁷ 88 F. Supp. 166 (S.D.N.Y. 1949).

⁵⁸ *Supra* note 52.

⁵⁹ See Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 Harv. L. Rev. 727 (1951).

⁶⁰ See, e.g., Wash. Rev. Stat. Ann., *Remington Supp.* 1940, §§ 2424, 2427; Cal. Civ. Code § 46; North Dakota N.D.R.C. 12-2815.

⁶¹ 340 P.2d 766 (Wash. 1959).

⁶² *Id.* at 768.

⁶³ Restatement (Second), Torts, Tentative Draft No. 11, § 568 (April 15, 1965) states: Broadcasting defamatory matter over radio or television is libel, whether it be read from a manuscript or not.

who is dead, or to impeach the honesty, integrity, virtue, or reputation or publish the natural defects of one who is alive and thereby to expose him to public hatred, contempt, ridicule, or financial injury.⁶⁴

This criminal statutory definition was applied in civil cases from its enactment in 1874 until its repeal in 1962⁶⁵ and became the established criterion used in defamation cases. Even though the statute has been repealed, its impact on the decisional law of the state probably has been forceful enough to perpetuate its content as the civil definition of libel.⁶⁶

The manners of dissemination described as libelous by the statute are printing, signs, pictures, or the like. Printed defamation has been without question held to be libelous in Illinois. The authority for this position is so strong that no specific cases need be discussed in supporting it.⁶⁷ The courts have not differentiated between written and printed libel. Defamation by photograph⁶⁸ or portrait printed in a newspaper advertisement⁶⁹ have been classified as libelous.

Defamatory conduct, namely placing a person's name in a police criminal "rogue's gallery," has been held to constitute libel and not slander in Illinois.⁷⁰ Oral defamation has been judicially treated as slander and no cases involving a variation from this traditional position have been reported. The question of the hand gestures of a deaf mute or the pantomime of defamatory words has not arisen.

That the Illinois courts are aware of the need to differentiate between libel and slander is without question. In *Ward v. Forest Preserve District of Winnebago County*⁷¹ the court emphasized the necessity of distinguishing oral and written defamation by stating:

In considering whether a defamatory charge is actionable or not the distinction between oral and written words must be kept in mind as the same rules of law do not apply to libel, as to slander, the law of the former being wider than that of the latter. Defamatory matter, printed and published may be actionable per se, while the same words, orally spoken, would not be so except [sic] they occasion special damages.

The reasons given for such rule are that words written or printed are in more permanent form, are susceptible of wider circulation, and hence capable of inflicting greater injury than those merely

⁶⁴ Ch. 38, § 401 (1961).

⁶⁵ 1961 Laws of Illinois, p. 1983 § 35-1 (effective Jan. 1, 1962).

⁶⁶ A 1965 civil case, *Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101, 205 N.E.2d 44 (3d Dist. 1965), referred to this statute, though repealed, in defining the tort of libel.
⁶⁷ The most recent case holding printed defamation, namely a newspaper editorial, libelous is *Wade v. Sterling Gazette Co.*, *supra* note 66.

⁶⁸ *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1st Dist. 1952).

⁶⁹ *Peck v. Tribune Co.*, 214 U.S. 185, 29 Sup. Ct. 554 (1909), *reversing* 154 Fed. 330 (7th Cir. 1908).

⁷⁰ *Wisher v. City of Centralia*, 273 Ill. App. 168 (4th Dist. 1933).

⁷¹ 13 Ill. App. 2d 257, 141 N.E.2d 753 (2d Dist. 1957).

spoken, also, that the defamation made in script or print necessitates some measure of deliberation, and so, of itself, imputes an evil intention to the writer, as a person who reduces a defamation to writing, is, by law presumed to have convinced himself of its truth and acted accordingly. With such considerations in mind the courts have declared the rule as to what spoken defamatory words are of themselves, and without proof of resultant special damages, actionable.⁷²

This statement, although dictum, interestingly suggests that the deliberate character of written defamation as opposed to the transitory and extemporaneous attributes of oral defamation will perhaps be considered in distinguishing whether a method of dissemination is slander or libel.

No cases concerning defamation by radio and television have yet arisen in Illinois. The legislature has attempted in vain to categorize such media of dissemination as either libel or slander. In 1927 the Illinois legislature passed the following statute, which categorized defamation by radio as slander:

Be it enacted . . . § 1 That any person who shall use, utter or publish words over, through, or by means of what is commonly known as the radio, which in their common acceptation shall tend to blacken the memory of one who is dead, or impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury, shall be guilty of slander.⁷³

However, this statute was repealed in 1945.⁷⁴ The repealed statute was supplanted by one which designated radio and television defamation libel:

A libel by radio or television is a malicious defamation broadcast by means of what is commonly known as the radio or television, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or to publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury.⁷⁵

This legislative determination perhaps reflected the attitude of the New York courts which were advancing the development of the actionability per se of radio and television defamation. However, this statute was repealed in 1955⁷⁶ and once more left the vexatious legal question as one which would have to be decided by the courts.

The only case even remotely considering defamation in the area of radio or television was *Lietzman v. Radio Broadcasting Station W.C.F.L.*,⁷⁷ in which an injunction was unsuccessfully sought to restrain the radio

⁷² *Id.* at 261, 141 N.E.2d at 759.

⁷³ 1927 Laws of Illinois, p. 406 § 1.

⁷⁴ 1945 Laws of Illinois, p. 683 § 2.

⁷⁵ 1955 Laws of Illinois, p. 1407 § 1.

⁷⁶ 1961 Laws of Illinois, p. 1983 § 35-1 (effective Jan. 1, 1962).

⁷⁷ 282 Ill. App. 203 (1st Dist. 1935).

broadcasting of commentaries concerning the plaintiff's allegedly unfair business practices. The court did not definitively decide whether the broadcasts constituted slander or libel. No other cases on this question have appeared to date in Illinois. The Seventh Circuit Federal Court of Appeals in *Wheeler v. Dell Publishing Co.*⁷⁸ treated a motion picture as libel but did not define it to be such.

It would appear that the Illinois courts have not yet been called upon to rule on the more difficult aspects of the distinction between slander and libel. Those factual situations before the court have been rather simply resolved on the established common law distinctions recognized universally.

Projecting the dictum stated in *Ward v. Winnebago*, perhaps Illinois will concentrate upon the deliberateness and permanent form aspect of written material. An interesting statement, also dictum, in *Whitby v. Associates Discount Corporation*,⁷⁹ namely, "A defamation designed for visual perception is a libel; an oral defamation is slander" might indicate the future adoption of the audio-visual theory.

MICHAEL D. SAVAGE

PUBLICATION

One of the essential elements of a cause of action in libel or slander is that the alleged defamatory words be published; that is, be communicated to a person other than the plaintiff himself.¹ The reason for the rule is that since the interest protected in defamation is the plaintiff's reputation, there can be no injury unless the defamation reaches some third person. Hence, the communication to the person defamed alone does not amount to a publication sufficient to sustain a civil libel for damages.² And, although it is not necessary that the plaintiff be mentioned by name in the publication, it must be understood to refer to him.³

Generally, the defamatory words must be heard or read by some third person with understanding. If that test is met, the publication may be in a foreign language,⁴ or in the presence of small children. Thus, in *Hammond v. Stewart*,⁵ wherein plaintiff was called a "whore" in the presence of her small children, the oldest of whom was six years of age, the court held that there was sufficient publication.

⁷⁸ 300 F.2d 372 (7th Cir. 1962).

⁷⁹ 59 Ill. App. 2d 337, 207 N.E.2d 482 (3d Dist. 1965).

¹ See Prosser, Torts § 108 (3d ed. 1964). See also *McLaughlin v. Schnellbacker*, 65 Ill. App. 50 (3d Dist. 1895).

² *Elliott v. McDonough*, 344 Ill. App. 211, 100 N.E.2d 803 (2d Dist. 1951).

³ *Algozino v. Welch*, 345 Ill. App. 135, 102 N.E.2d 255 (1st Dist. 1951).

⁴ *Nolte v. Herter*, 65 Ill. App. 430 (3d Dist. 1895).

⁵ 72 Ill. App. 512 (3d Dist. 1898).